(4)

No. 90-380

In the Supreme Court of the United States

OCTOBER TERM, 1990

CONSOLIDATED RAIL CORPORATION, PETITIONER

v.

DELAWARE & HUDSON RAILWAY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a lawful monopolist has a duty to deal with a rival on terms allowing the rival a reasonable profit without regard to the effect on competition of a refusal to deal on such terms.

2. Whether the court of appeals held that a monopolist's anticompetitive intent can transform otherwise lawful conduct into a violation of Section 2 of the Sherman Act.

3. Whether the "essential facilities" doctrine provides a basis for holding that a monopolist must make a facility available to a competitor at a particular price solely to assure that the competitor earns a profit satisfactory to it.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Consolidated Rail Corporation (Conrail) and respondent Delaware & Hudson Railway Company (D&H) carry freight in the northeastern United States. Congress created Conrail in response to the financial collapse of regional railroads in the 1970s, combining several rail systems into one system with about 17,000 miles of track. D&H, both older and smaller, has only about a tenth as much track. Pet. App. 2a, 15a.

Because of D&H's smaller size, its tracks do not reach the termini necessary to serve many northeast recipients of newsprint shipped from Quebec. D&H's routes to these recipients, therefore, must employ Conrail's tracks for part of the journey. In contrast, Conrail can serve these same customers over its own tracks without using those

of D&H. All of these newsprint routes originate on the tracks of Canadian railroads. Pet. App. 2a-3a.

Rail shipments involving the tracks of multiple railroads are conventionally subject to "joint rates" (single rates charged to shippers for the entire shipment), with the revenues divided among the railroads involved according to a particular "division." Pet. App. 3a. Historically, rail regulation served to assure that shipping rates were equal over all routes between two given points.[1] The division of revenues between carriers participating in joint routes, however, might differ between routes. Divisions were determined either by negotiations among the railroads or by Interstate Commerce Commission prescription.

In prescribing divisions, the starting point, and sometimes the ending point, was the mileage of each railroad participating in the joint rate: "As a general rule where operating conditions are substantially similar, the straight mileage pro-rate is accepted as a fair basis for dividing joint rates." *Louisville Board of Trade* v. *Indianapolis, C. & S. Traction Co.*, 34 I.C.C. 640, 642 (1915), quoted in Teagarden, *The Federal Government and Railroad Rate Division: Policies and Practices*, 55 Transp. Prac. J. 15, 18 (1987). The Transportation Act of 1920, ch. 91, 41 Stat. 456, provided for ICC determination of "just, reasonable, and equitable divisions" and specified factors to be considered in determining divisions, including the efficiency of the carriers, their revenue requirements, and other facts "which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less

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[1] "The principle * * * is vital in our commercial life that there shall be one fixed and absolutely rigid rate governing the transportation at a given time of any given commodity between two given points." *A.J. Poor Grain Co.* v. *Chicago, Burlington & Quincy Ry.*, 12 I.C.C. 418, 423 (1907). See also *Chesapeake & Ohio Ry.* v. *United States*, 704 F.2d 373, 376 (7th Cir. 1983) ("Although the routes are different, the origin, destination, and commodity are the same, so the joint rates almost certainly would have to be the same to avoid violating the prohibition against rate discrimination in 49 U.S.C. § 10741(a).").

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proportion than another carrier of the joint rate." 49 U.S.C. 15(6) (1976) (repealed).[2] That provision of the Transportation Act "was designed for affirmative use in relieving the financial needs of weak carriers." *United States* v. *Great Northern Ry.*, 343 U.S. 562, 569 (1952), citing *The New England Divisions Case*, 261 U.S. 184, 189-195 (1923). Nevertheless, divisions continued to be based in substantial measure on mileage. *E.g.*, *Chicago & N.W. Ry.* v. *A., T, & S.F.R.R.*, 387 U.S. 326 (1967) (weighted mileage).

The Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, substantially deregulated railroad rates. Pet. App. 3a, 16a. Nonetheless, prior to 1982, the joint rates and divisions applicable to Quebec newsprint destined for the eastern United States were the ones set under the pre-Staggers Act regulatory regime. Conrail and D&H's rates on alternative routes between any given two points were equal, and the divisions apparently were roughly in proportion to mileage. Pet. App. 32a.[3]

In 1982, the Canadian Pacific Railroad and the Canadian National Railroad, faced with increasing competition from trucks, proposed lower joint rates for newsprint. Conrail accepted the Canadian proposals for lower joint rates on routes for which it was the only American rail carrier but rejected them for routes also involving

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[2] Substantial portions of 49 U.S.C. 15(6) (1976) have been carried forward into current law. See 49 U.S.C. 10705(c). However, the "just, reasonable, and equitable" standard of 49 U.S.C. 15(6) (1976) has been replaced by a different standard: "Divisions of joint rates * * * must be made without unreasonable discrimination against a participating carrier and must be reasonable." 49 U.S.C. 10701(a).

[3] Although the record does not indicate the preexisting divisions between Conrail and D&H, it gives no reason to suppose they were not roughly in proportion to mileage. The parties do not controvert the court of appeals' statement (Pet. App. 3a) that "[e]ach railroad's share of the rate usually is in proportion to the percentage of miles traveled on that railroad's tracks."

D&H. Following a "make or buy" policy,[4] Conrail indicated it would agree to a lower joint rate on the routes involving D&H only if the division were adjusted so that Conrail earned as much profit on the route involving D&H as it would on the route not involving D&H. Pet. App. 4a, 21a. Because the D&H portion of these routes was significantly longer than Conrail's, Conrail's proposal amounted to a significant shift in the preexisting divisions, to Conrail's benefit and D&H's detriment. D&H, faced with a choice "between giving up almost all of its profits on a given route and losing entirely the ability to carry freight on the route," *id.* at 4a, rejected Conrail's proposal.

2. D&H filed an antitrust suit against Conrail, alleging (as narrowed during litigation) that, in violation of Section 2 of the Sherman Act (15 U.S.C. 2), Conrail had monopolized and attempted to monopolize the transportation of newsprint from Eastern Canada to the mid-Atlantic states, primarily by adopting and implementing the "make or buy" policy. Pet. App. 15a-17a, 20a.

The district court granted summary judgment for Conrail. The parties agreed, for purposes of summary judgment, to the relevant product and geographic markets alleged by D&H, and the court presumed for purposes of its decision that Conrail had monopoly power in that market. Pet. App. 18a. The court also found, based on a single memorandum, "relatively clear proof of Conrail's monopolistic intent."[5] *Id.* at 19a. The court recognized,

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[4] According to Conrail, the make or buy policy "means that Conrail would not 'buy' a service (in this case, D&H's rail transportation for part of a shipment) if it could 'make' that service itself less expensively" and that "Conrail would not 'sell' its services below its profit-maximizing price." Pet. 3. As the court of appeals explained, "Under that policy, Conrail would agree to the reduced rate only if its profit, called 'contribution', matched its profit on the route where it was the sole carrier." Pet. App. 4a.

[5] The memorandum, from an assistant vice-president to the senior vice president for operations, included this statement: "I'm for monopoly in total! . . . So let's Conrail take and rationalize the entire D & H." Pet. App. 7a, 19a.

however, that intent alone did not suffice to convert monopoly power into unlawful monopolization. *Ibid.*

Relying on the jury instruction this Court approved in *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 597 (1985), the court concluded that the remaining issue was "whether Conrail's make or buy policy was a legitimate business practice, and therefore not violative of Section 2, or whether this program was exclusionary, and therefore impermissible under the [Sherman] Act." Pet. App. 20a. The court found that the policy maximized Conrail's profits as compared to a policy giving a larger share of the revenues to D&H. Stating that "[a] monopolist is not required to engage in practices which are less profitable than other, legitimate practices," the court concluded that the make or buy policy was a valid business practice and did not violate Section 2. Pet. App. 22a, citing *United States Football League* v. *National Football League*, 842 F.2d 1335, 1361 (2d Cir. 1988).

Analyzing the same facts in light of the "essential facilities" doctrine, the court assumed that Conrail's tracks were an essential facility. It held, however, that D&H had failed to show that Conrail had unreasonably denied access to the tracks, because the make or buy policy, which set the terms under which Conrail would permit "access," was reasonable. Pet. App. 25a-26a. The court therefore granted summary judgment for Conrail on the monopolization claim.[6] *Id.* at 29a.

3. The court of appeals reversed. In its view, "whether Conrail's make or buy policy constituted willful anticompetitive conduct" presented a genuine issue of material fact. Pet. App. 6a. The court explained that although a profit maximization goal "provides support for an argument that the policy is a legitimate practice," *id.* at 7a, neither *Aspen* nor *United States Football League* held that conduct intended to maximize short-term profits can-

[6] The court also granted summary judgment for Conrail on the attempted monopolization claim, which rested primarily on the make or buy policy. Pet. App. 26a-28a.

not violate Section 2. Pet. App. 6a-7a. It then concluded that there was sufficient record evidence to support a jury finding of monopolization, and that the district court therefore had erred in granting summary judgment. Without cataloguing the evidence it deemed sufficient, the court gave, as examples, a statement by a former Conrail executive to the effect that "the refusal to concur in lowered joint rates would have been implemented whether or not it increased Conrail's profits"; statements indicating that several Conrail employees considered a shift of traffic from D&H to Conrail desirable; a statement indicating that a Conrail analyst believed that at least one joint rate under Conrail's make or buy policy would result in "almost ludicrously low" profits for D&H; the presumed harm to D&H from implementation of the policy; and the "monopoly in total" statement (see note 5, *supra*) on which the district court relied. Pet. App. 7a.

Treating the "essential facility" theory separately, the court concluded that Conrail's tracks were an essential facility, that duplication was impractical, and that it was feasible for Conrail to provide the facility to D&H. Accordingly, the court held that Conrail's denial of access, if "unreasonable," would constitute a violation of Section 2. Pet. App. 9a. The court then concluded that there was a genuine issue of material fact as to whether the terms of the make or buy policy were reasonable. In reaching this conclusion, the court relied on a hypothetical example constructed by the district court, *id.* at 22a n.7, as evidence that Conrail had, in effect, increased the price Conrail charged D&H for transporting a particular short haul by 800%.[7] *Id.* at 10a. "The magnitude of that increase," the court said, "may be sufficient in itself to create a triable issue as to whether the terms were unreasonable." *Ibid.* The court did not decide that issue, however, because it believed that "the various statements of Conrail executives" it had previously discussed "support our conclusion that there is a triable issue." *Ibid.*

[7] The record does not indicate whether 800% reasonably approximates any actual effective price increase in the market in question.

The court added that it need not determine "the circumstances under which a legitimate business practice will shield a defendant from liability for conduct that otherwise would constitute denial of an essential facility," because it had already determined that there was a genuine issue of material fact whether the make or buy policy was a "legitimate practice." *Id.* at 10a-11a.[8]

DISCUSSION

The central question in this case is whether Conrail's refusal to cooperate with its competitor in setting a joint rate on the basis of the traditional division was exclusionary conduct likely to injure competition.[9] The resolution of that issue turns on the competitive significance of Conrail's "make or buy" policy as applied in this case. In our view, D&H failed to "come forward with 'specific facts showing that there is a *genuine issue for trial*,'" *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)), as to any adverse effect on competition flowing from Conrail's conduct. Consequently, the court of appeals should have affirmed the district court's entry of summary judgment for Conrail.

Instead, for reasons that the court's opinion does not fully explicate, the court of appeals reversed and remanded the case for trial. On this record, the logical

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[8] The court also rejected Conrail's contention that D&H had failed to raise a genuine issue of monopoly power, Pet. App. 8a, and reversed the district court's grant of summary judgment on the attempted monopolization claim. *Id.* at 11a.

[9] The complaint in this case alleges both monopolization and attempted monopolization. Because the district court's grant of summary judgment rested on the holding that Conrail's conduct was not exclusionary, the court did not focus on the other elements of those offenses. Although Conrail challenged in the court of appeals the existence of monopoly power, Conrail does not renew that challenge here. Accordingly, without expressing a view on the issue, we will assume that Conrail has monopoly power. We will also address the nature of Conrail's conduct without distinguishing between monopolization and attempted monopolization.

implication of the court's holding appears to be that a lawful monopolist must deal with its business rival on terms that provide the rival with a reasonable profit, regardless of the effect of the monopolist's conduct on competition and consumers. That holding distorts the purpose of the Sherman Act, and warrants review by this Court. Although the decision below is interlocutory and the court of appeals' reasoning is not entirely clear, we believe that the court's treatment of a monopolist's obligation with respect to dealings with competitors represents a sufficiently serious departure from proper antitrust principles, in an area of potentially broad application, to justify this Court's intervention.

1. a. In *Aspen*, the Court upheld a jury determination that the refusal by the operator of three ski areas to cooperate with the operator of a fourth ski area in allowing the marketing of a four-area ticket was exclusionary conduct in violation of Section 2 of the Sherman Act.[10] The Court was careful to emphasize, however, that "even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor." 472 U.S. at 600. Nor, the Court added, is the exclusionary character of a monopolist's conduct established solely by evidence that the refusal adversely affected the competitor. *Id.* at 605; see also *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962) (antitrust laws enacted to protect competition, not competitors). To the contrary, the impact on consumers must be considered. 472 U.S. at 605; see also *American Academic Suppliers, Inc.* v. *Beckley-Cardy, Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,296, at 65,091 (7th Cir. Jan. 17, 1991). The trier of fact must determine whether the challenged conduct has "impaired competition in an unnecessarily restrictive way," 472 U.S. at 605, which requires consideration of whether the firm has been "attempting to

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[10] The Court noted that conduct sufficient to constitute monopolization under Section 2 of the Sherman Act has variously been termed "exclusionary," "anticompetitive," or "predatory." 472 U.S. at 602.

exclude rivals on some basis other than efficiency." *Ibid.*, quoting R. Bork, *The Antitrust Paradox* 138 (1978).

Applying those principles, the Court in *Aspen* focused on the impact of the challenged conduct on competition. It concluded that the defendant's refusal to allow a four-area ticket to be sold denied consumers the opportunity to purchase a product that they valued highly. 472 U.S. at 605-607. Although the Court discussed the effect of that refusal on the plaintiff's ability to compete, it did not stop with an observation that the plaintiff's profits were reduced. Rather, it set forth the plaintiff's vigorous attempts, which the defendant thwarted, to develop alternatives that would allow the marketing of the four-area ticket that consumers desired. *Id.* at 607-608. Finally, the Court found confirmation for its conclusions in the defendant's failure to offer "any efficiency justification whatever for its pattern of conduct." *Id.* at 608. The defendant "did not persuade the jury that its conduct was justified by any normal business purpose." *Ibid.* Rather, the evidence supported an inference that the defendant "was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Id.* at 610-611.

b. In contrast to the Court's approach in *Aspen*, the court of appeals in this case failed to consider the impact on competition and consumers from Conrail's conduct and the efficiency justification that Conrail offered in its defense. Absent from the court's opinion is any suggestion that this record would support a finding that Conrail's conduct adversely affected competition. The court supplied no reason to believe that Conrail's conduct was inconsistent with short-run profit maximization, that consumers were denied the benefits of superior efficiency or deprived of valued services, or that prices were increased or output reduced. Instead, the implication of the decision is that D&H may prevail upon showing that it did not have the opportunity to make as much money as it would have if Conrail had been willing to agree to a lower joint rate on the basis of the traditional division. That

holding—which is our best reading of an opinion that is characterized by less than crystalline clarity—represents a distortion of basic antitrust principles. Moreover, in our view, this summary judgment record does not support characterization of Conrail's conduct as exclusionary.

(1) To begin with, there is no basis for a conclusion that any shipper paid more, or would pay more, or would receive less, because of Conrail's conduct. D&H cites nothing in the record to show that any shipper was unable to obtain rail transportation for newsprint from Canada to points in the eastern United States, or that any shipper was unable to obtain the reduced rate by shipping over Conrail's route.[11] D&H does not contend that Conrail's agreement to continue the traditional division would have allowed D&H and Conrail jointly to offer a lower rate than the Conrail rate; rather, D&H wanted the rates for the joint route and the all-Conrail route to be equal.

D&H asserts that "the elimination of D&H from certain routes harmed shippers because Conrail was no longer forced to compete on the basis of anything other than price, such as speed and quality of service." Br. in Opp. 17. But, as a threshold matter, neither the court of appeals nor D&H cites evidence in the summary judgment record indicating that Conrail's conduct deprived D&H of the ability to continue providing service on its alternative route, and thus eliminated it as a competitor. The court of appeals stated that "there is no question that D&H was harmed by the implementation of the policy." Pet. App. 7a. But the court did not assert that there is evidence—and D&H refers to none—demonstrating that the harm amounted to more than a diminution of

[11] D&H contends there is evidence indicating "that Conrail harmed shippers by ignoring their preferences" for reduced rates (Br. in Opp. 17, citing Opp. App. 3a-4a). But that evidence, to which the court of appeals did not refer, shows only that Conrail refused to concur in reduced rates over alternative routes involving D&H, not that shippers failed to receive reduced rates.

D&H's profits.[12] To the contrary, the court of appeals' opinion suggests that it assumed that D&H could have made at least some profit at the reduced rate, even on Conrail's terms.[13]

Even if we assume that D&H would have been unable to operate profitably under Conrail's proposed division, nothing in the court of appeals' opinion or in D&H's submissions suggests a reason for making the further, and critical, assumption that consumers were thereby disadvantaged.[14] D&H points to no evidence that any shipper preferred D&H over Conrail[15] or that D&H offered superior service in any respect. And D&H has not suggested that it made any attempt to negotiate a joint rate that afforded Conrail the contribution it demanded while leaving D&H a share sufficient to allow it to operate profitably. If D&H offered services that shippers

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[12] Although D&H sought protection under Chapter 11 of the Bankruptcy Code (six years after the events in question and two years after it filed this action), D&H offered no evidence that its insolvency directly resulted from Conrail's conduct, or even that its financial condition would not have been improved if it had entered into a joint rate with Conrail consistent with Conrail's make or buy policy.

[13] See Pet. App. 4a (D&H would have to give up "*almost* all of its profits on a given route" (emphasis added)). See also Pet. App. 7a (citing evidence that under the make or buy policy D&H profits "would be almost ludicrously low").

[14] "[T]he fact that a railroad discontinues a particular service offering is not necessarily a sign of diminished competition from a broad consumer-welfare standpoint. Although a shipper might in theory prefer one through route to another—maybe one is faster, and that was the one that has been 'closed'—in practice routing is almost always determined by the originating carrier rather than by the shipper. Time-sensitive shipments are rarely made by train; if the shipper wants speedy delivery he uses another mode." *Chesapeake & Ohio Ry.* v. *United States*, 704 F.2d 373, 377 (7th Cir. 1983).

[15] To be sure, there were shipments over D&H tracks prior to the rate reduction. But there is no evidence that the shippers, as opposed to the originating carriers (the Canadian railroads), selected the route, let alone cared which of two equally priced routes was selected.

valued and could not obtain from Conrail, then shippers presumably would have been willing to pay a higher rate to obtain joint D&H/Conrail service.

(2) Nor, in our view, did the court of appeals identify any evidence that would justify a trier of fact in concluding that Conrail's conduct is best understood as exclusionary rather than efficiency-based.[16] The court stated that a former Conrail executive indicated that "the refusal to concur in lowered joint rates would have been implemented whether or not it increased Conrail's profits." Pet. App. 7a. But whether Conrail would have implemented its policy even if it was unprofitable does not establish that the profitable policy it did implement is exclusionary. As the district court noted, there was no evidence that Conrail in fact ever refused to concur in a joint rate where it would have been more profitable to concur. *Id.* at 23a.

The court of appeals also cited other statements of Conrail officials as examples of Conrail's exclusionary purpose. Evidence of intent may be probative of the anticompetitive nature and effect of conduct.[17] But, even if Conrail's employees anticipated or desired the demise of D&H as a competitor, we do not believe that the record supports the inference that Conrail's actual conduct was exclusionary rather than efficiency-based. Conrail's policy

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[16] As *Aspen* makes clear, exclusionary rather than efficiency-based concerns may be probative of injury to competition. 472 U.S. at 608-609. This consideration, however, loses force in the unusual case where, as here, the absence of injury to competition is plainly shown by other factors.

[17] Contrary to Conrail (see Pet. 14, 17-21), we do not understand the court of appeals to have held that intent alone can transform otherwise lawful conduct into a violation; consequently, we do not believe that the second question presented by the petition (Pet. (i)) is raised by this case. The court specifically noted the statement of a Conrail vice president that he was in favor of Conrail's taking over D&H entirely. Pet. App. 7a. Although the district court considered that statement "relatively clear proof of monopolistic intent," *id.* at 19a, the court of appeals explained that the statement, "standing alone would not give rise to a § 2 violation." *Id.* at 7a.

benefitted Conrail without regard to its impact on D&H. If D&H had accepted Conrail's proposal and continued to carry the traffic, Conrail would have made just as much money as it did by carrying all the traffic over its own route, and newsprint shippers would have been no better and no worse off. Conrail was not "sacrific[ing] short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Aspen*, 472 U.S. at 610-611.

Nor was Conrail's policy one that inherently tended to exclude an equally efficient or more efficient competitor. D&H did not offer evidence explaining why it could not have operated profitably, if its costs were equal to or lower than Conrail's. Conrail's proposed division of revenues would have compensated D&H (for transporting the newsprint to the transfer point on the D&H/Conrail route) in an amount equal to Conrail's cost of transporting newsprint to that same point over its own route. Under that policy, if D&H could not prosper, the inference to be drawn is that its costs were greater than Conrail's.[18] On this record, it cannot be said that Conrail was "attempting to exclude rivals on some basis other than efficiency." *Aspen*, 472 U.S. at 605.

It is true that Conrail's make or buy policy did not lower Conrail's cost of providing service over its own track. Rather, the policy increased Conrail's profits by

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[18] We understand that "cost" in this context is based on an ICC methodology and includes both variable cost and some portion of fixed cost. Conrail was, in effect, offering to "buy" transportation over D&H's tracks at some price greater than its own variable cost, or, alternatively, selling transportation over the segment of its route that duplicated D&H's route at a price above its variable cost. We do not contend that a make or buy policy such as Conrail's could never have the effect of excluding an equally efficient competitor in the long run. And such an exclusion could affect consumers adversely. See, *e.g.*, *Chesapeake & Ohio Ry.*, 704 F.2d at 377 (closing of more efficient through routes by means of joint rate cancellations might be profitable in regulated market and may result in higher costs for transportation). But D&H presented no evidence of such circumstances in this case.

capturing for Conrail the rents attributable to the segments of the route on which Conrail faced no railroad competition. But that does not mean that the policy was not efficiency-based or lacked a valid business reason. Ordinarily, an efficient firm will seek to charge a profit-maximizing price. And it is not an antitrust offense for a lawful monopolist to charge a monopoly price. See generally, P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 736.1g, at 756 (Supp. 1990); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 274 n.12 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); *Continental Cablevision* v. *American Elec. Power Co.*, 715 F.2d 1115, 1121 (6th Cir. 1983).[19] In any event, requiring the monopolist to share its revenues with a rival would not prevent consumers from having to pay the monopoly price.[20]

c. In remanding this case for a jury trial on the issue whether Conrail's conduct towards D&H violated Section 2 of the Sherman Act, the court effectively established a monopolist's duty to deal with a rival where, under

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[19] Any monopoly power Conrail possesses by virtue of its ownership of tracks is, of course, a product of Congress's action in creating Conrail. Although Congress intended Conrail to be subject to antitrust liability for any misuse of its power (see, *e.g.*, H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 83 (1980) (cancellation of joint rates)), there is little room to argue—and we do not understand D&H to contend—that Conrail's acquisition of control over segments of track violated the antitrust laws.

[20] Nor should the fact that regulatory policy required the monopolist to share its profits with weaker competitors in the past impose a duty on the monopolist to continue sharing them once regulatory restrictions are removed. The Court in *Aspen* found it significant that the defendant had cooperated with the plaintiff in the past because the development and persistence of that cooperation was evidence that the cooperation was efficient. *Aspen*, 472 U.S. at 604 & n.31. But in *Aspen*, unlike this case, the cooperation had "originated in a competitive market," and similar arrangements prevailed in other competitive markets. *Id.* at 603. Here, in contrast, past practice was dictated by regulation and not by market forces. In that setting, there is no basis for inferring that a change in the defendant's practice is not based on efficiency concerns.

Aspen, no such duty exists. Although the court did not delineate the scope of that duty, the implication of its holding is that a monopolist must deal on terms that provide its rival with a reasonable profit, even if the monopolist must reduce its own profit to do so and there is no adverse effect on consumer welfare from a refusal to deal. We know of nothing in antitrust law that would require a monopolist to subsidize its rival's profits in this manner; indeed, such a requirement would be both unsound in theory and unworkable in practice.

Equally unsettling, the court's standard offers the monopolist no guidance in setting its price to a rival, if it must subsidize its rival's profit. Liability would inevitably turn on the trier of fact's conception of a reasonable price and a reasonable profit. The court of appeals seems to have decided this case in the spirit of the Transportation Act of 1920 ch. 91, 41 Stat. 456, not under the law of the Sherman Act. It is the former, not the latter, which "was designed for affirmative use in relieving the financial needs of weak carriers." *Great Northern*, 343 U.S. at 569.

2. Casting the issue in terms of an essential facilities analysis provides no additional support for the court of appeals' conclusion.[21] Even if we assume, as the district court did, Pet. App. 25a, that short-haul Conrail tracks that reach locations to which D&H lacks direct access may be considered an essential facility, D&H never requested the right to use those tracks to provide service itself, so far as this record reveals. Nor is D&H's complaint that Conrail will not provide service on those

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[21] Although this Court has never explicitly relied on the essential facilities doctrine and declined to consider it in *Aspen*, the elements of that doctrine are widely accepted in the lower courts. A four factor test is conventionally applied: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *MCI Communications* v. *American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-1133 (7th Cir.), cert. denied, 464 U.S. 891 (1983), quoted at Pet. App. 9a.

tracks to D&H customers on a nondiscriminatory basis.[22] D&H's essential facilities claim reduces to a restatement of its argument that Conrail was obligated to share with D&H a portion of its monopoly revenues. That is, the true "essential facility" here is not track; it is money.

Considering D&H's claim under an essential facilities rubric should not change the result under Section 2. That is because D&H's claim still should fail unless Conrail's refusal to cooperate on the terms D&H desired adversely affects competition.[23] "The essential facilities doctrine is predicated on the assumption that admission of the excluded applicant would result in additional competition in an economic * * * sense." *Mid-South Grizzlies* v. *National Football League*, 720 F.2d 772, 787 (3d Cir. 1983), cert. denied, 467 U.S. 1215 (1984); cf. *Olympia Equip. Leasing Co.* v. *Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) (essential facility must be reasonably "indispensable to effective *competition*") (emphasis added), cert. denied, 480 U.S. 934 (1987). The issue whether the denial of access is unlawful cannot be approached solely by considering the impact of denial on a particular competitor. Where, as here, the party seeking access to a facility seeks merely to "share[] the

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[22] For that reason, the court of appeals' reliance on *United States* v. *Terminal R.R. Ass'n*, 224 U.S. 383, 411 (1912), is misplaced. The passage of the Court's opinion quoted by the court of appeals (Pet. App. 9a-10a) discussed a requirement of *nondiscriminatory* access to an essential facility. *Terminal R.R.* did not impose a general duty to deal on "reasonable" terms.

[23] To the extent that the court of appeals considered denial of access to an essential facility to constitute a distinct antitrust offense, see Pet. App. 11a (referring to "the antitrust offenses of monopolization, denial of essential facilities and attempted monopolization"), we disagree. Section 2 of the Sherman Act establishes no offenses other than monopolization, attempted monopolization, and combination or conspiracy to monopolize. The "essential facility" doctrine simply describes one form of conduct that may, in some circumstances, constitute monopolization or attempted monopolization.

monopolist's gains," increased competition is unlikely.[24] D&H may have required more favorable terms in order to achieve a certain level of profits, but requiring Conrail to grant D&H access on those terms will not increase competition: it will neither dilute any monopoly power Conrail has by virtue of its control of one segment of a route, nor affect the price and terms offered shippers.

The court of appeals did not ask whether the denial of access to D&H would have an anticompetitive effect; rather, as we read its somewhat Delphic opinion, the court was of the view that Conrail's conduct could be found unlawful solely by virtue of the magnitude of Conrail's increase in price and statements by Conrail executives that the court interpreted as supporting an exclusionary motive. But, if Conrail's conduct was, as the court did not dispute, designed to maximize its profits (both short and long-term), its conduct could be found "unreasonable" only if the jury were entitled to find that D&H had a right to share in Conrail's profits.[25] It is not the purpose of the antitrust laws, however, to impose the duty on a monopolist to assure that its rivals obtain a sufficient level of profit.

The Fourth Circuit's decision in *Laurel Sand & Gravel, Inc.* v. *CSX Trans., Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,312, at 65,185 (Jan. 30, 1991), illustrates

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[24] Areeda, *Essential Facilities: An Epithet In Need Of Limiting Principles*, 58 Antitrust L.J. 841, 852 (1990) ("A single firm's facility * * * is 'essential' only when it is both critical to the plaintiff's competitive vitality and the plaintiff is essential for competition in the marketplace"; "[n]o one should be forced to deal unless doing so is likely substantially to improve competition in the marketplace by reducing price or by increasing output or innovation.").

[25] Although the court did not explicitly articulate that proposition, we believe it to be the logical implication of the court's reasoning. If Conrail's increase in its share of contribution exposes it to liability even though that pricing policy maximizes Conrail's short and long-term profits and does not injure consumers, the only justification for so holding must be that Conrail's conduct is not "economically reasonable" *to D&H*.

our point.[26] There, the plaintiff alleged that defendant CSX had denied it access to an essential facility (CSX's track) by offering to transport the plaintiff's goods, while denying trackage rights to the plaintiff over CSX's track. Viewing CSX's offer of transportation as an alternative means of access to the facility, the Fourth Circuit considered whether CSX's offer of transportation was reasonable. It then held that the transportation offer was "a reasonable alternative" to trackage rights because it was "reasonable from CSX's perspective" to offer "$2.12 per ton, a penny over the variable costs." *Id.* at 65,190. The court added that "the reasonable standard of the access factor can not be read to mean the assurance of a profit" for the person seeking access. *Ibid.* In contrast to the Fourth Circuit's sound analysis, the court of appeals here seems to have required just that assurance.

3. In holding that a trier of fact could find unlawful Conrail's refusal to cooperate on the terms D&H desired, without regard to the effect of the refusal on competition, the decision below represents a serious distortion of antitrust law. Allowing a jury to evaluate the reasonableness of Conrail's actions from the standpoint of D&H's interests would, in practice, nullify this Court's admonition in *Aspen* that monopolists are under no general obligation to cooperate with their rivals. The result would be to transform Section 2 of the Sherman Act from a guardian of competition to a regulatory statute focused on the welfare of competitors.

Such a transformation, which in this case resurrects an abandoned regulatory regime, would have substantial anticompetitive consequences. Recognizing a duty to share profits with competitors would reduce incentives to investment and innovation by siphoning off the rewards normally accruing to desirable behavior. And distributing profits to competitors would reduce the incentive to strive for greater efficiency, or even prevent the

[26] The court of appeals discussed the district court's decision in *Laurel Sand*, Pet. App. 10a; subsequently, the Fourth Circuit affirmed the judgment in that case.

exit of inefficient firms from the market and the redirection of their resources to more productive uses. Moreover, the duty the court of appeals appeared to create could chill aggressive competition as firms, uncertain of what prices they may charge their competitors and yet avoid liability, were forced to set prices on some basis other than ordinary profit maximization. In effect, firms would be forced to guess what prices would be required by unpredictable regulatory decrees issued by particular juries.

We note, in closing, the obvious prudential factors pointing in favor of letting this case go, namely, it is of course in an interlocutory posture, and the court of appeals was less than clear about the nature of the required "reasonable" dealing that it applied to Conrail's conduct. That being said, the fact remains that the court of appeals has held that the trier of fact could find Conrail liable in the absence of any reason to believe that consumers and competition were adversely affected. The only issue for trial is whether Conrail's terms for cooperation were "reasonable" in some sense foreign to the antitrust laws.

The very requirement that such an issue need be submitted to trial, rather than resolved on summary judgment, is itself a serious error. The salutary principle reflected in this Court's decision in *Matsushita*—a point that bears reemphasis—is that antitrust defendants should not be subjected to the formidable burdens and risks of trial on the basis of evidence that is insufficient to support a viable theory of antitrust liability. Decisions such as this one, by failing to apply *Matsushita* with rigor and by misapplying basic antitrust doctrine, not only affect the particular parties but also, through their impact on antitrust counseling, more broadly influence business practices. Indeed, the vagueness of the court's opinion may contribute to its impact, because the threat of burdensome litigation and possible treble damages liability tends to induce firms to stay well within the bounds of established law. In light of these considerations, we believe that review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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